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No. 06-748

IN THE

Supreme Court of the United States

Emma Lively,

Petitioner,

v.

Wild Oats Markets, Inc.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Ninth Circuit held in this case that the forum defendant rule is procedural, rather than jurisdictional, such that a violation of the rule was waived when it was raised in the district court more than thirty days after removal but before final judgment. Although respondent does not dispute that the courts of appeals are intractably divided on this important question, it nonetheless contends that certiorari is not warranted. However, each of its arguments against certiorari falls short. First, construing the forum defendant rule as jurisdictional, rather than procedural, is most consistent with this Court's precedents, the statutory removal scheme, and the purposes of the forum defendant rule. Second, any "prejudice" that respondent would purportedly suffer if this Court were to grant certiorari is either irrelevant or, for the most part, largely of respondent's own making. Accordingly, certiorari should be granted.

1. Significantly, respondent does not dispute that the Ninth Circuit's holding in this case (as well as the similar holdings of the Second, Third, and Fifth Circuits) conflicts directly with the rule of the Eighth Circuit, which holds that because a violation of the forum defendant rule constitutes a jurisdictional defect, a district court may remand the case to state court at any time before final judgment.[1] Instead, respondent argues only that certiorari is not warranted because the Eighth Circuit's decision is "fatally flawed." BIO 9. But that is precisely the question that petitioner has asked this Court to review – viz., whether a violation of the forum defendant rule is a procedural or jurisdictional defect.

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[1] Although respondent characterizes the circuit split as pitting nine courts of appeals against the Eighth Circuit, such a characterization overlooks the distinguishing fact that – as the petition explains (at 11 n.4) – five of those courts considered remand only after a final judgment was entered.

Nor does respondent seriously dispute that the split among the circuits with regard to the question presented is entrenched, outcome-determinative in petitioner's case, ripe for this Court's review, and squarely presented here. Rather, respondent contends only that because the rule espoused by the Ninth Circuit is the majority rule, "an Eighth Circuit case would be the appropriate vehicle for resolution." BIO 6. But such an argument is nonsensical, as this Court routinely grants certiorari in cases in which respondents relied on the majority rule in prevailing below. And in any event, there is a real prospect that in light of the Eighth Circuit's recent reaffirmation of its holding that the forum defendant rule is jurisdictional, *see Horton v. Conklin*, 431 F.3d 602 (2005), *cert. denied*, 127 S. Ct. 60 (2006), this Court will *never* be presented with an "appropriate vehicle" from the Eighth Circuit, whose rule is now sufficiently well-established that a defendant running afoul of the forum defendant rule in that circuit is unlikely to incur the expenses of a fruitless appeal, much less a petition for certiorari.

2. In arguing that the decision below is consistent with this Court's precedents, respondent relies almost exclusively on *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972), suggesting that this Court in *Grubbs* "clearly could not have found that the violation of the [forum defendant rule] destroyed subject matter jurisdiction" because jurisdictional defects cannot be waived. BIO 8. Contrary to this erroneous suggestion, however, neither the forum defendant rule nor removal under Section 1441(a) was at issue in *Grubbs*, which involved the then-current version of 28 U.S.C. § 1444, which provided for removal of certain claims brought against the United States. 405 U.S. at 702.

In addition to mischaracterizing *Grubbs*, respondent badly misreads it. As this Court made clear in *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), *Grubbs* "instructs that an erroneous removal need not cause the destruction of a final judgment, if the requirements of federal subject-matter juris-

diction are met at the time the judgment is entered." 519 U.S. at 73.

Following this rule, the Court in *Caterpillar* – in which complete diversity was lacking at the time of removal, but the nondiverse defendant was dismissed before the case went to trial – declined to vacate the trial court's judgment, explaining that "[t]he *jurisdictional* defect was cured, *i.e.*, complete diversity was established before the trial commenced." 519 U.S. at 73. This Court further reiterated that although prudential considerations such as finality, efficiency, and judicial economy counseled against dismissal based on the lack of diversity at the time of removal, such considerations do not apply to an uncured defect in subject-matter jurisdiction: "if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment *must* be vacated." *Id.* at 76-77.

In this case, the defect in subject-matter jurisdiction – viz., the removal in violation of the forum defendant rule – was never cured because respondent, the forum defendant, remained in the case. Moreover, the prudential considerations identified by this Court in *Caterpillar* are irrelevant, as neither a trial on the merits nor an entry of final judgment had occurred when the district court issued its remand order.

Respondent's heavy – although ultimately unavailing – reliance on *Grubbs* ignores entirely this Court's holding in *Martin v. Snyder*, 148 U.S. 663 (1893), which is directly on point. As the petition explains (at 14), *Martin* specifically held that a defendant's failure to satisfy the forum defendant rule results in a "want of jurisdiction." As such, this Court vacated a decree in the defendant's favor and remanded the case to state court. 148 U.S. at 664. Respondent does not even mention – much less distinguish – *Martin*, which has never been overruled or called into question by this Court.

3. For the most part, respondent similarly fails to address the petition's showing (at 13-15) that construing the forum defendant rule as jurisdictional is also most consistent with the statutory removal scheme enacted by Congress. To

be sure, respondent does contend (at 10) that "subject matter limitations on federal jurisdiction keep the federal courts within the bounds the Constitution and Congress have prescribed." But that is precisely *petitioner's* point: as the petition explains (at 14-15), Congress specifically distinguished between original and removal jurisdiction, generally rendering the latter significantly narrower than the former. *See also* Pet. 15 n.6 (noting other ways in which original and removal jurisdiction are not co-extensive). However, the rule adopted by the Ninth Circuit and espoused by respondent in this case would all but obliterate this distinction by conflating the requirements for original and removal jurisdiction.

And although respondent asserts that the forum defendant limitation must be procedural because the statute does not indicate that it is jurisdictional, respondent is simply mistaken. First, in enacting the provisions governing removal, Congress clearly distinguished between removal procedure – which is governed by Sections 1446 and 1447 – and removal jurisdiction, which is created by Section 1441. Pet. 13. Second, and more importantly, this Court has itself acknowledged that Section 1441 confers "removal jurisdiction." *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 7 (1983). *Contra* BIO 14 (contending that this Court "has consistently interpreted provisions of removal as questions of procedure").

4. Despite respondent's argument that "institutional concerns" counsel in favor of construing the forum defendant rule as procedural, each aspect of its argument misses the mark.

First, respondent appears to assert (although it does not do so explicitly) that characterizing the forum defendant rule as procedural will best protect the plaintiff's choice of forum. Respondent then makes the general assertion that even when a plaintiff has opted to file her case in state court, "sometimes [she] will simply not object to . . . removal so [she] can move the case forward." BIO 11. Notably, however, respondent

does not suggest that such a scenario existed in petitioner's case. Rather, as both the petition (at 16-17) and the facts of this case make clear, characterizing the forum defendant rule as jurisdictional best protects the plaintiff's choice of forum: if a plaintiff wants to have her diversity case heard in federal court, she can simply file it there herself. She does not need to file her suit in state court and then gamble that the defendant will remove the case in violation of the forum defendant rule. By contrast, if a plaintiff such as petitioner prefers to be in state court, she can file her suit there. Under a jurisdictional characterization of the forum defendant rule, if she has sued a forum defendant who improperly removes the case, the case must return to her preferred state forum even if neither the court nor the plaintiff discovers that the defendant is a forum defendant until after Section 1447(c)'s thirty-day window has passed.

Second, respondent's contention that "a jurisdictional characterization of the forum defendant rule . . . promotes unfair gamesmanship by plaintiffs" (BIO 11) is belied by the facts of this case. As the petition makes clear (and respondent itself acknowledges), no such gamesmanship was present here: the district court – *not* petitioner – raised the issue of a possible violation of the forum defendant rule. In truth, and contrary to respondent's argument, opportunities for gamesmanship are most likely to be created by a characterization of the forum defendant rule as procedural. Indeed, this case exemplifies the perils of such a characterization, which would require a plaintiff to discover the defendant's true citizenship and move to remand within thirty days of removal. A procedural characterization would thus create an incentive for a forum defendant – such as respondent in this case – to remove the case to federal court in violation of the forum defendant rule in the hopes of preventing the plaintiff and the court from

discovering the violation until after the thirty-day window has expired.[2]

Third, respondent's reliance on *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), to support its assertion (at 12) that "allowing a *sua sponte* remand by the District Court runs contrary to another of the removal procedure statutes' fundamental goals – promoting judicial economy" is misplaced. As discussed *supra* at 2-3, this Court made clear in *Caterpillar* that, prudential considerations such as judicial economy notwithstanding, "if at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated." 519 U.S. at 76-77. And to the extent that respondent complains of inefficiency and prejudice in this case, respondent has only itself to blame: it – not the court or petitioner – was responsible for removing the case in violation of the forum defendant rule, and it could have resolved the forum defendant issue at an early stage in the proceedings by being more forthcoming about its principal place of business.

5. Nor, contrary to respondent's arguments, does the legislative history of Section 1447(c) – which specifies when a case may be remanded to state court – suggest that Section 1441(b)'s forum defendant rule is non-jurisdictional. At most, the 1996 amendments to Section 1447(c) made clear that motions based on "any defect other than lack of subject matter jurisdiction" must be made within thirty days of removal, *see* H.R. Rep. No. 104-799, at 2 (1996), without providing any further illumination regarding what constitutes a "lack of subject matter jurisdiction."[3]

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[2] Although respondent asserts that as a general rule, "it would not be difficult for a plaintiff to determine whether there is at least an issue as to whether the defendant is a local defendant" (BIO 11), its assertion ignores entirely that defendants themselves are in the best position to provide information regarding their true citizenship.

[3] Notably, respondent does not dispute that the 1996 amendment to Section 1447(c) was likely intended to eliminate confusion

6. Finally, respondent's repeated invocation of the "prejudice" that it would allegedly suffer if certiorari were granted is unavailing. As an initial matter, any "prejudice" to respondent from having to undergo proceedings in this Court is simply the same "prejudice" borne by all respondents. And although respondent complains that it will suffer "prejudice" from having to undergo "additional litigation" notwithstanding that petitioner's underlying personal injury claim has been deemed "merit-less," that complaint overlooks both that petitioner has appealed the district court's order entering summary judgment and that respondent itself has refused to stay proceedings in the lower courts pending this Court's review.[4]

CONCLUSION

For the foregoing reasons, as well as the reasons outlined in the petition, certiorari should be granted.

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regarding whether an "improvident" removal constituted adequate grounds for a remand. *See* Pet. 18. Obviously, to the extent that the legislative history cited by respondent (at 6-7) in fact addresses the financial effects of such a change, it is thus irrelevant to the question presented. In any event, however, the prediction that the legislation enacting the 1996 amendment "would not result in any significant impact on the federal budget" has no effect on whether the question presented is worthy of this Court's review, particularly when – again, as respondent does not dispute – the question presented has a potentially broad effect on the thousands of diversity cases removed to federal court each year.

[4] The district court's entry of summary judgment in respondent's favor and petitioner's subsequent appeal only heighten the need for this Court's review to clarify whether the district court in fact had jurisdiction to enter such an order and whether the Ninth Circuit has jurisdiction to entertain an appeal of that order. Absent this Court's review, there is the very real prospect that the Ninth Circuit will render a decision on the merits of petitioner's claim even though it lacks jurisdiction to do so.

Respectfully submitted,

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